Supreme Court, U.S.
FILED
SEP 29 1997
CLERK

(12)

No. 96-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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September 29, 1997

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Common Cause submits this brief *amicus curiae* with the consent of the parties.[1] Common Cause is a non-profit

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[1] Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, Common Cause states that the brief in its entirety was drafted by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made

membership organization with approximately 250,000 dues-paying members in all fifty States and the District of Columbia. Common Cause promotes, on a non-partisan basis, its members' interests in open, honest, and accountable government and political representation. Common Cause seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause frequently has participated in litigation seeking to protect the integrity of the electoral process. It has filed briefs as a party or *amicus curiae* in numerous cases before this Court and other federal and state courts concerning the constitutionality and implementation of federal and state election laws.

As an integral part of its goal of enhancing accountability and electoral reform, Common Cause has dedicated itself since the early 1970s, following the Watergate scandal, to promoting full disclosure of campaign finance activities and compliance with the Federal Election Campaign Act of 1971 ("FECA" or "Act"). By publicizing the sources, uses, and dollar amounts of political contributions and expenditures, as well as violations of the campaign laws, Common Cause seeks to empower its members and other citizens to make informed electoral decisions. In addition, by publicizing the campaign finance practices of political entities nationwide, Common Cause and its members seek to energize support for electoral reform.

This Court's decision on the standing issue could have a profound impact on Common Cause's ability as an organization to provide its members and the general public with information concerning the role of money in federal elections and the effectiveness of the FECA. To ensure that

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by any person or entity other than *amicus curiae*, its members, or its counsel.

information about campaign finance issues, which is necessary to an informed electorate, is fully disclosed as required by law, voters and organizations like Common Cause must be able not only to file complaints with the FEC, but also to seek judicial review when the FEC has failed to enforce the FECA.

Congress provided in the FECA that "aggrieved" complainants may challenge FEC rulings in such circumstances. However, because of lower-court confusion about the appropriate standards for establishing standing and hypertechnical applications of those standards, Common Cause has faced, and has a significant future risk of facing, inconsistent and unduly restrictive standing determinations. *See, e.g., Common Cause v. Federal Election Comm'n*, 108 F.3d 413 (D.C. Cir. 1997). Common Cause accordingly requests the Court to use this case to make clear that organizations such as Common Cause (and their voter members) have standing to sue to vindicate the rights of their members to information required to be disclosed under the FECA.

Thus, complainants who are aggrieved because the FEC has failed to act on or has dismissed their administrative complaint in a manner contrary to law should be held to have standing both where their administrative and judicial complaints allege (1) violations of the disclosure and reporting provisions of the FECA, such as where a candidate simply fails to report contributions, and (2) violations of other provisions of the FECA that do not directly require disclosure, but which have the consequence of triggering a separate reporting and disclosure obligation (and violation). The present case, like most cases of consequence, falls into this latter category. Respondents alleged that AIPAC made campaign contributions and expenditures in excess of $1,000,

therefore qualifying it as a political committee under the FECA, but that it failed to register as a political committee. Since the American Israel Public Affairs Committee ("AIPAC") did not treat itself as a political committee, it failed to make the disclosures required of political committees. *See Akins v. Federal Election Comm'n*, 101 F.3d 731, 734 (D.C. Cir. 1996) (*en banc*). The effect on voters and organizations such as Common Cause of a failure to enforce is the same in both situations: deprivation of campaign finance information useful in evaluating candidates and in monitoring elected officials.

INTRODUCTION AND SUMMARY OF ARGUMENT

A principal purpose of the FECA was to provide the public with access to information on political contributions and expenditures so that the public would know which candidates were receiving what and from whom. As this Court has explained, disclosure of this information serves at least three substantial governmental interests: (1) enhancing the ability of the electorate to evaluate candidates for federal office,[2] (2) deterring corruption and the appearance of corruption by making large contributions and expenditures

[2] As the Court elaborated:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (*quoting* H.R. Rep. No. 92-564, at 4 (1971)).

publicly known,[3] and (3) providing data that will assist in detecting other violations of the campaign laws. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976). Reflecting the importance of these objectives, Congress mandated that all disclosure filings be made available for public inspection within 48 hours of receipt. *See* 2 U.S.C. §§ 432(g)(4), 438(a)(4), 439(b)(3). In addition, Congress established in the FECA a mechanism intended (among other things) to ensure compliance with both the disclosure provisions of the FECA and other FECA provisions that impact disclosure obligations.

Congress vested the Federal Election Commission ("FEC" or "Commission") with principal responsibility for civil enforcement under the FECA. *See* 2 U.S.C. §§ 437d(e), 437g. At the same time, Congress recognized that the involvement of private parties acting both to protect their own interests and as private attorneys general would be necessary to effectuate the purposes of the FECA.

Congress therefore adopted a statutory structure under which private parties serve an essential, supplemental enforcement role. In particular, Congress provided that "any person" who believes a violation of the reporting or other requirements of the FECA has occurred may bring that violation to the attention of the FEC by filing a complaint. *See* 2 U.S.C. § 437g(a)(1). In the first instance, the FEC has responsibility for investigating the alleged violation. *See* 2 U.S.C. §§ 437g(a)(1)-(7). Congress further provided that if the FEC dismisses the complaint or fails to act on it in a timely manner, the complainant may file a petition for review

[3] The Court further noted that publicity about significant contributions also allows the public to better monitor whether post-election preferences or special favors are given to these contributors. *Id.* at 67.

with the District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). If the court determines on review that the dismissal or the FEC's failure to act was "contrary to law," the court may enter an order directing the FEC to conform with the Court's ruling. 2 U.S.C. § 437g(a)(8)(C). If the FEC fails to do so within 30 days, the complainant may bring a civil action, in the complainant's own name, to remedy the violation charged in the complaint. *Id.*

Congress' intent that the FECA provide broad standing to challenge non-enforcement of the Act is clear from the structure and language of the Act's enforcement provisions. The fundamental question is the degree to which the broad standing intended by Congress is consistent with Article III. It is, for a number of independent reasons.

First, voters who allege that they have been denied information relevant to their electoral decision, either through violations of reporting and disclosure provisions or violations of other provisions of the Act, enforcement of which triggers reporting and disclosure obligations, have standing to seek judicial review under Section 437g(a)(8)(A). One of the primary purposes of the FECA is to provide voters with information Congress has determined is integral to the electoral decision. A voter who has been denied that information has been injured in a personal and concrete way by being deprived of something of utility and value to him or her in making an electoral decision.

Second, Respondents suffered injury sufficient to establish standing because the nondisclosure of information about AIPAC impeded their ability to conduct their daily operations. As the original panel of the D.C. Circuit concluded, the failure to disclose information about AIPAC's contributors and expenditures impaired Respondents' ability to influence and inform policymakers and the public on issues

concerning Israel. *See Akins v. Federal Election Comm'n*, 66 F.3d 348, 350-51 (D.C. Cir. 1995), *vacated*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*).

Third, the FECA was intended to provide the public generally with information Congress concluded was useful both to evaluate candidates in the electoral process and to monitor and evaluate elected officials in the conduct of their duties. *See Buckley*, 424 U.S. at 66-68. As with statutes such as the Freedom of Information Act ("FOIA") and the Federal Advisory Committee Act ("FACA"), the FECA creates a right to information required to be disclosed under the Act. The denial of a claimant's access to information to which he or she is entitled under the Act is an injury sufficient in and of itself to establish standing.

Fourth, the FECA creates a procedural right on behalf of an individual who has properly filed an FEC complaint to have that complaint addressed in a timely fashion and not dismissed on grounds that are arbitrary or capricious or otherwise contrary to law. Congress has the power to establish an administrative process to handle a complaint, to establish procedures and substantive standards to be followed in that administrative process, and to provide a mechanism for judicial review of that process. Here, Congress has done so by providing that a complainant "aggrieved" by the agency's conduct of the administrative process may seek judicial review of the agency's conduct with regard to his or her particular claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992), is not to the contrary.

ARGUMENT

THIS COURT SHOULD AFFIRM RESPONDENTS' STANDING TO CHALLENGE THE FEC'S DISMISSAL OF THEIR ADMINISTRATIVE COMPLAINT

Under Article III of the Constitution, the jurisdiction of the federal courts is limited to "Cases" or "Controversies." U.S. Const. art. III, § 2. One of the elements of the case-or-controversy requirement is standing. *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997). To establish Article III standing, a party generally must demonstrate three elements:

> [1] that he has suffered "injury in fact," [2] that the injury is "fairly traceable" to the actions of the defendant, and [3] that the injury will likely be redressed by a favorable decision.

Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997) (citation omitted). In addition, a party must satisfy judicially imposed prudential requirements for standing, unless Congress has abrogated those requirements. *Id.* Respondents, who alleged that they were deprived of information to which they have a right under the FECA, satisfy all the elements of standing.

A. Respondents Have Established Standing as Voters

1. Respondents Suffered Article III Injury in Fact Because They Were Deprived of Information Useful to Them as Voters

In holding "that [Respondents] have standing as *affected* voters," *Akins v. Federal Election Comm'n*, 101 F.3d 731, 738 (D.C. Cir. 1996) (*en banc*) (emphasis in original), the court of appeals made two, distinct findings regarding the injury-in-fact prong of the Article III standing inquiry. First, the court held that a voter deprived of information relevant to his or her vote suffers an injury in fact. *Id.* at 737. Second,

the court held that under the circumstances of the case it was fair and appropriate to conclude that AIPAC had made contributions in elections in which one or more of the respondents voted. *Id.* at 737-38. This Court should affirm both holdings.

Petitioner does not take issue with the conclusion of the court of appeals that a voter deprived of useful information in connection with an election in which he or she votes has suffered a particularized, concrete injury. *See* Petitioner's Br. at 28. Nor, reasonably, could Petitioner contest this conclusion. In enacting the FECA, Congress determined that the information to be disclosed is important to the electoral decisionmaking process and that voters have a right to that information. *See Buckley*, 424 U.S. at 66-67. When information is withheld from a voter in violation of the requirements of the FECA, the voter is deprived of information that is useful, and therefore of value to the voter, in his or her personalized evaluation of the candidates.

Instead, Petitioner takes issue with the court of appeals' holding that it would presume that contributions and expenditures were made by AIPAC in elections in which Respondents voted. *See Akins*, 101 F.3d at 738. Petitioner does so in something of a peculiar way, however. Rather than addressing the validity of the court's presumption that the elections in which Respondents participated corresponded with the contributions and expenditures AIPAC made,[4]

[4] The approach of the court of appeals is a reasonable and appropriate response to the circumstances of the case. It would be an unfair obstacle to standing to require the Respondents to prove AIPAC's contributions and expenditures when that "is precisely the information of which [Respondents] claim they have been deprived." *Akins*, 101 F.3d at 737-38. It would, moreover, create perverse incentives if the more successful politicians, parties, and PACs are at hiding their expenditures from the public, the less likely it is that there will be standing. If the

Petitioner recasts the court's holding as a finding that injury in fact is established if AIPAC "*may have made* contributions" in the elections in which Respondents voted. *See* Petitioner's Br. at 28 (emphasis in original).

To the extent Petitioner is suggesting that the court of appeals did not think a direct connection between the election and the payment was required to establish standing, Petitioner is mistaken. The court of appeals was explicit in holding that such a direct connection was required. *See Akins*, 101 F.3d at 737 ("[I]t would not be enough for standing in this case for [Respondents] to assert only that they were voters, for [Respondents] would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted.").

Having constructed its mistaken premise, Petitioner then argues that since the court's analysis would apply to all registered voters, the harm at issue is a "generalized grievance" that does not satisfy the requirements of Article III standing. *Id.* But Petitioner's focus on the number of elections, or voters affected, is misguided. The standing analysis is the same whether one election is at issue, or hundreds throughout the nation; the injury does not become less personal and concrete because a large class of people also have suffered an injury. To the contrary, as this Court has previously held, "[t]he fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [the] asserted

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Court concludes that such a presumption cannot stand, then it should remand the matter to the district court to allow Respondents to establish the factual basis for a finding that AIPAC made contributions and expenditures in elections in which they voted.

injury." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989).[5]

Rather, a "generalized grievance" is characterized less by the size of the group injured than by the "the diffuse and abstract nature of the injury." *Akins*, 101 F.3d at 737; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992) (discussing cases). The injury alleged here is not the amorphous or abstract right to good governance usually at issue in the "generalized grievance" cases, but the personal concrete injury of persons deprived of information of value to them in making their respective, personal electoral decisions. *See, e.g.*, *Public Citizen*, 491 U.S. at 449-50.

2. The Denial of Information to the Respondents Is "Fairly Traceable" to the FEC's Failure To Require Disclosure and Would Likely Be "Redressed" by an Order Entered by the Court

The injury Respondents suffered is "fairly traceable" to the actions of the FEC. Respondents' failure to obtain information about AIPAC contributions and expenditures is a direct result of FEC's determination that AIPAC is not a political committee, and therefore under no obligation to make the disclosures at issue. Not surprisingly, Petitioner does not challenge this determination. As the court of appeals noted, a contrary argument "would stretch causation to its breaking point; no one would have standing to challenge the Commission's determination, or for that matter,

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[5] *See also United States v. SCRAP*, 412 U.S. 669, 687-88 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

many other administrative agency actions." *Akins*, 101 F.3d at 738.

Petitioner does take issue with the conclusion of the court of appeals that Respondents' injury likely will be redressed, but again the argument stretches redressability to (and beyond) its breaking point. Petitioner's contention that it is "far from clear that respondents would ultimately acquire the information they seek" given the discretion of the FEC not to institute an enforcement action, the possible alternative defenses of AIPAC, and the possibility that relief might not include disclosure,[6] Petitioner's Br. at 29-30, proves too much. As the court of appeals stated, Petitioner's argument amounts to "a breathtaking attack on the legitimacy of virtually all judicial review of agency action." *Akins*, 101 F.3d at 738. The same arguments Petitioner makes here can be made regarding judicial review of almost all agency action.[7] *See* Petitioner's Br. at 30 (conceding that these issues

[6] In addition to the other problems with Petitioner's argument identified in text, the various possible scenarios to which Petitioner points are themselves quite speculative. Respondents are not required to establish with certitude that their injury will be redressed, only "that the injury will *likely* be redressed by a favorable decision." *Bennett*, 117 S. Ct. at 1161 (emphasis added).

[7] Petitioner goes on to argue that the specific circumstances of this case and likely legal arguments in an enforcement action against AIPAC make the likelihood that an order from the court will redress the injury particularly speculative. This Court should decline Petitioner's invitation to adopt an approach that will have courts passing judgment on legal issues not otherwise before them and not otherwise in dispute, including apparently arguments that would be raised, if at all, in the future by persons not even parties to the suit. The use of judicial resources required by the Petitioner's suggested approach would be quite considerable. It also would be a peculiar result indeed for the Constitution, in the name of limiting courts to cases or controversies, to require courts routinely to

"will be present to some degree in most suits brought under Section 437g(a)(8)(A)").[8]

3. Prudential Concerns Do Not Limit the Standing of Voters Under Section 437g(a)(8)(A) of the FECA

Petitioner does not contest that voters are within the zone of interests covered by the FECA, undoubtedly for the sound reason that a voter's interest in obtaining information to evaluate candidates is at the core of the interests intended to be advanced by the FECA's disclosure provisions. *See Buckley*, 424 U.S. at 66 ("[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office.") (*quoting* H.R. Rep. No. 92-564, at 4 (1971)); *see also Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Instead, Petitioner argues that this Court should give Section 437g(a)(8)(A) a cramped construction in order to eliminate standing for voters. *See* Petitioner's Br. at 23, 29. The language of Section 437g(a)(8)(A) is, however, plain and unambiguous. Section 437g(a)(1) permits "[a]ny person" to

evaluate legal issues on which the parties are not now, and may never be, squarely joined.

[8] In any event, Respondents would have standing in this case even if they could not satisfy the "redressability" prong because they have suffered injury to a procedural right. Sections 437g(a)(1), (a)(8)(A), and (a)(8)(C) create a procedural right intended to assist voters and others in protecting (among other things) their concrete interests in the disclosure of information useful to them in the electoral process. "[A] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7.

file a complaint with the FEC, and Section 437g(a)(8)(A) provides that:

> *Any party aggrieved* by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. § 437g(a)(8)(A) (emphasis added). There is no warrant for this Court to ignore that plain language, which unambiguously extends the benefit of the provision to "any party aggrieved." Section 437g(a)(8)(A) represents the clear intention of Congress to rebut the presumption against judicial review of an agency's failure to take action on which Petitioner's argument relies; the very purpose of the Section is, among other things, to subject the FEC to review in situations when it has not taken action. *See, e.g., Democratic Congressional Campaign Comm. v. Federal Election Comm'n*, 831 F.2d 1131, 1133-34 (D.C. Cir. 1987).

Accordingly, Petitioner is left with the unsupportable proposition that the use of the narrower language "any party aggrieved" in the FECA, as contrasted to the "adversely affected or aggrieved" language of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, somehow reflects a congressional intent to exclude from the FECA's judicial review provision voters seeking campaign-finance information. But Congress' decision to use the word "aggrieved" in the FECA and to omit the words "adversely affected" serves a plainer purpose.[9] It simply reflects the fact

[9] *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 (1987) ("[A]t bottom the reviewability question turns on congressional intent.").

that, unlike the APA which extends to a range of agency actions, including rulemakings, and does not limit review to persons who brought proceedings before the agency, Section 437g(a)(8)(A) covers a very narrow class of agency action -- dismissal of or failure timely to address a complaint -- and is limited to a narrow class of potential litigants -- persons who filed the complaint in question with the FEC.[10]

Moreover, it stretches reason to conclude that a provision intended by Congress to supplement and aid enforcement of the FECA should be read to exclude the primary beneficiaries of such enforcement actions -- voters -- from obtaining judicial review of complaints they have properly filed with the Commission. Had Congress wanted to exclude voters, it easily could have done so, either by expressly excluding voters from the Section or specifically including only certain categories of persons, such as opposing candidates, their parties, and supporting PACs. Instead, Congress chose the broad terms of Sections 437g(a)(1) and 437g(a)(8)(A), "any person" and "any party aggrieved."[11]

[10] *Cf. Reytblatt v. United States Nuclear Regulatory Comm'n*, 105 F.3d 715, 720 (D.C. Cir. 1997) (interpreting "party aggrieved" under the Hobbs Act to mean a participant in the agency proceeding who meets constitutional and prudential standing considerations, the latter represented by the zone-of-interests test); *Jones v. Board of Governors of the Fed. Reserve Sys.*, 79 F.3d 1168, 1170 (D.C. Cir. 1996) (noting that the D.C. Circuit "has consistently interpreted the phrase 'party aggrieved' to require as a general matter that petitioners be parties to any proceeding before the agency" (internal quotation and citation omitted)).

[11] Moreover, there is no reason to think that Congress generally viewed politicians, political parties, and PACs as better private attorneys general than voters. While politicians, political parties, and PACs may have competing interests that lead them in some cases to seek enforcement, they just as often have a shared interest in keeping the level of disclosure and enforcement limited for all.

B. Respondents Have Standing as Persons Deprived of Information Integral to Their Daily Operations

Apart from the injury Respondents suffered in their capacity as voters, they also suffered an additional type of injury in fact because "their ability to influence and inform policymakers and the public [was] impaired by the lack of information about AIPAC's contributors and expenditures." *Akins v. Federal Election Comm'n*, 66 F.3d 348, 350-51 (D.C. Cir. 1995), *vacated*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*). A line of D.C. Circuit cases, supported by precedent from this Court, has recognized standing where a failure to disclose information or a restriction on the flow of information creates a significant, direct, adverse impact on the daily operations of an organization or person.[12]

This was the basis of the original D.C. Circuit panel determination that Respondents had standing in this case. While not without ambiguity, the *en banc* court in *Akins* appears to have put the informational standing argument to the side, concluding that the primary injury alleged sounded more in voter injury than the informational-injury line of cases. *See Akins*, 101 F.3d at 736. The informational standing doctrine has considerable potential importance to Common Cause since its core organizational objectives and daily operations -- publicizing, monitoring, and analyzing campaign contributions and expenditures -- qualify it under

[12] *See, e.g., Akins*, 101 F.3d at 735; *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001 (1990); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("If, as broadly alleged, petitioner's steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact.").

the D.C. Circuit cases to challenge decisions dismissing complaints it brings at the FEC. While the present case can be decided based on Respondents' standing as voters (as well as the other grounds discussed below), the Court may, in view of the ambiguity below, wish to confirm at least the potential application of informational standing doctrine in these circumstances.

Prudential standing also exists for claims, such as Respondents', under the informational-standing line of cases.[13] Under the zone-of-interests test, the prudential standing inquiry turns on whether the interests at issue are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing*, 397 U.S. at 153.[14] Respondents' interests in informing the public about the sources of campaign contributions and the corresponding influence such contributions could create with candidates, as part of its general efforts to influence and inform the public debate on foreign policy in the Middle East, fall easily within the interests protected by the FECA. As this Court previously has noted, the governmental interests protected by the FECA's disclosure provisions include helping the electorate evaluate candidates -- "sources of a candidate's

[13] The causality and redressability prongs of Article III standing are met under informational standing as well, for the reasons discussed above in Part A.2.

[14] *See also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) ("In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." (citation omitted)).

financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office" -- and helping deter actual or perceived corruption -- "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 66-67.[15]

C. Respondents Have Standing as Members of the Public Deprived of Information to Which They Were Entitled Under the FECA

While Congress cannot create standing where a constitutionally sufficient injury does not exist, Congress has the authority to create a legal right that did not previously exist (and a cause of action to protect that right), interference with which constitutes an injury in fact. *See Lujan*, 504 U.S. at 578; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). As with the FOIA and the FACA, Congress intended through the FECA to provide the public (both voting and non-voting) with information about the operation of the governmental process that Congress concluded the public had

[15] Rather than the narrow zone of interests suggested by Petitioner, the FECA has the indicia of a statute in which Congress sought to extend standing to the limits of Article III. To begin with, the language of the FECA is quite broad: Sections 437g(a)(1) and 437g(a)(8)(A) work in conjunction to provide "[a]ny person" a right to file a complaint with the FEC and if that complaint is dismissed or not acted on in a timely manner, to seek judicial review. *See* 2 U.S.C. §§ 437g(a)(1) & 437g(a)(8)(A). The subject matter of the FECA and the purpose of the provisions at issue further support the understanding that Congress intended standing to extend broadly to all citizens. The electoral process and freedom from governmental corruption are "matter[s] in which it is common to think all persons have an interest," and there can be little dispute "that the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general.'" *Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997).

a right to know. Congress charged the FEC to collect and make that information publicly available, and any person can obtain that information either at the offices of the FEC or by submitting a written request to the FEC. *See* 2 U.S.C. §§ 438(a)(4)-(7); 11 C.F.R. §§ 5.1-5.6 (1997). Congress also established a review mechanism through which information may be obtained if disclosure is wrongfully withheld.

While the FOIA and the FECA are not identical in all respects, both create a right to information on behalf of a broad class of persons.[16] And this Court's precedents establish that nondisclosure of information required to be disclosed under such a statute is injury sufficient to confer standing under Article III. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989) ("Our decisions

[16] The distinction drawn by the court of appeals between the FOIA and the FECA, *Akins*, 101 F.3d at 736, is off point. The difference that does exist is two-fold. First, disclosure of the relevant information under the FECA is, in the first instance, mandatory and automatic, whereas under the FOIA a specific request must be made. The fact that Congress found the information at issue under the FECA important enough to require immediate and automatic disclosure certainly does not militate against the importance of the right. Second, the procedure adopted under the FECA requires exhaustion of an administrative process before resort to the courts. The fact that Congress chose a slightly different process by which a person may seek to obtain information that wrongfully has not been disclosed, however, does not alter the fundamental similarity between the FOIA and the FECA.

Similarly, Petitioner's attempt to create a dispositive distinction between the FOIA and the FECA is unavailing. The fact that the FOIA proceeding is to compel the government to disclose information already in its possession, whereas the FECA requires the government to enforce disclosure obligations applicable to a third party, is a difference that does not affect whether there is injury in fact, but only causation and redressability concerns. For the reasons stated above in Part A.2., and in the opinion of the court of appeals, *Akins*, 101 F.3d at 738-39, causation and redressability are easily met.

interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."); *Havens Realty* 455 U.S. at 373-74.[17]

D. Respondents Have Standing as Individuals Denied Procedural Rights Created by the FECA

Under this Court's decision in *Lujan*, 504 U.S. at 576-78, Congress may not create standing for judicial enforcement of an abstract right in all citizens to have the Executive act in conformity with the law. It is, however, within Congress' power to create a right to information about campaign contributions and expenditures; to establish an administrative process to provide individuals redress for violations of that right; to define procedures and substantive standards to be followed in that administrative process; and to provide for judicial review of that process.

Here, as an aid to statutory enforcement, Congress included in the FECA a provision that permits any person to bring an administrative complaint regarding a violation of the FECA. *See* 2 U.S.C. § 437g(a)(1). The FECA also creates a procedural right for the benefit of persons who properly file such complaints -- that the FEC will address the complaint in a timely fashion and will not dismiss it on grounds that are arbitrary or capricious or otherwise contrary to law. *See* 2 U.S.C. §§ 437g(a)(8)(A) & (C). When the FEC fails to address a complaint in a timely manner or does so in a manner that is contrary to law, it deprives the particular complainant of a right to have his or her complaint treated in accordance with the procedures and standards established by the FECA. This is not a generalized grievance or merely a

[17] Causality and redressability are met as discussed above in Part A.2, and any prudential standing requirements are met as discussed in Part B.

general public interest that has been violated. Rather, it is a personal and concrete injury to the particular claimant's right to receive the treatment guaranteed to his or her complaint under the Act.[18]

The procedural right at issue here is in marked contrast to the citizen-suit brought by the plaintiffs in *Lujan*, who sought to force the government to follow certain procedures requiring consultation among governmental agencies under the Endangered Species Act. The plaintiffs had no personal participation in the procedures at issue. In contrast, the FECA creates rights for particular persons who file administrative complaints and imposes express duties on the government that are for the benefit of, and personal to, those complainants. When the FEC dismisses or fails to address a complaint in a manner that is arbitrary or capricious or otherwise contrary to law, the injury to the complainant is not a generalized grievance, but a specific, concrete injury to that individual. As such, it is an injury sufficient to establish standing for judicial review of the FEC's dismissal of or inaction on the complaint.[19]

[18] The complainant, moreover, often also will have relied to his or her detriment on that statutorily created right. In particular, the FECA imposes burdens on a complainant: the complaint must be in writing, signed, sworn, and notarized, and it is submitted under penalties of perjury and subject to the criminal provisions of 18 U.S.C. § 1001 (false statements). *See* 2 U.S.C. § 437g(a)(1).

[19] Causality and redressability are clearly met. Respondents' deprivation of the right to have their complaint handled by the FEC in accordance with the procedures and standards established by the FECA is directly caused by the FEC's alleged failure to adhere to those procedures and standards originally and is directly redressable by the FEC adhering to them on remand. Zone-of-interests considerations are met as well: The procedural rights allegedly violated were established for the benefit of complainants such as Respondents.

CONCLUSION

For the foregoing reasons this Court should affirm on the issue of standing.

Respectfully submitted,

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September 29, 1997